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In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY and DR. RICHARD BENJAMIN, in his official capacity,

Petitioners,

v.

MICHAEL DOE, by and through his parents and next friends, DR. AND MRS. BILL DOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. In a case brought by the parents of a child with a disability for reimbursement of the costs of a residential educational placement, may the school district, by raising the defense that the parents failed to timely notify the district of their child's educational needs, convert the parents' suit for reimbursement into a facial challenge to the district's approved plan that implicates the spending clause?

2. Do due process hearing officers have jurisdiction to hear " . . . complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child,", 20 U.S.C. § 1415(b)(1)(E)?

3. Are there disputed issues of material fact as to whether or not the Metropolitan Nashville Public Schools met its duty to identify, locate and evaluate all children, 20 U.S.C. § 1412(2)(C), and specifically Michael Doe, who are in need of special education?

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STATEMENT OF THE CASE

A. Statutory context

Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"), in response to public school districts' exclusion of children with disabilities and their failure to detect the disabilities of children living within the district. Congress was attempting to redress its finding, *inter alia*, that "one million of the handicapped children in the United States are excluded entirely from the public system and will not go through the education process with their peers." 20 U.S.C. §1400(b)(4)[1] Toward this end, the statute imposes an affirmative obligation on school districts that accept federal funds earmarked for children with disabilities to identify, locate and evaluate eligible children within their jurisdiction. When a school district accepts funds pursuant to §1411(d) of the IDEA, it agrees to use those funds to

> provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education

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[1] The IDEA has since been reauthorized and amended, effective June 4, 1997. The cited language was in effect at the time of the initiation of the administrative complaint in this matter. Its substantial equivalent is new 20 U.S.C. §1400(b)(4), effective July 1, 1998.

> and related services and which children are not currently receiving such education and services.

20 U.S.C. §1414(a)(1)(A). In order to receive payments under §1411(d), each school district must "provide assurances" to the state educational agency that it "will establish or revise, whichever is appropriate, an individualized educational plan for each child with a disability." 20 U.S.C. §1414(a)(5). Based on such assurances, each state, in return for federal IDEA funds, provides the Secretary of Education with a plan

> set[ting] forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that . . . all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

20 U.S.C. §1412(2)(C).

These provisions of the IDEA, coupled with federal administrative approval of each state's plan, give school districts clear notice of the duties they incur in exchange for federal funds. In this way IDEA differs fundamentally from, for instance, Title IX, the passive language of which provides public school students with only negative rights against sex discrimination. See 20 U.S.C. §1681(a). Whereas Congress in Title IX stopped short of holding

school districts liable in monetary damages for undetected sex discrimination in an implied private action, (*see, Gebser v. Lago Vista Independent School District*, No. 96-1866, June 22, 1998, ___ U.S. ___ (1998)), in the IDEA Congress included affirmative provisions requiring school districts to seek out children with disabilities previously excluded by the school system and to evaluate their unmet educational needs. It is these "child find" provisions that the Does asserted as a response to the school system's claim that the Does had not asked for services.

B. Factual background

In 1992, the parents of Michael Doe elected to place him in a private residential educational placement. They had tried a number of private schools already for their then twelve year old son, but none had been able to cope with the serious aggressive behavior that is part of Michael's serious emotional disturbance. Up to and including that time, Michael's parents were unaware that the residential educational services Michael needed were available through their public school system.

In October of 1993, once Michael had been attending the residential educational placement for a full year, his parents learned that their public school district might be obliged to meet the specific needs of their child. The Does gave the school system copies of psychological evaluations and requested a multi-disciplinary team meeting to propose an individual educational plan for Michael to address his educational needs. Despite several meetings the school system did not respond for six months. In the

interim Michael remained in the residential placement at a total cost of $87,155. The school district refused to reimburse the Does for any costs of Michael's residential placement, even for the costs incurred while the multidisciplinary team's review was pending.

C. Decisions Below

At a due process hearing before a Tennessee administrative law judge, the Does sought reimbursement for Michael's residential placement. Their complaint was that the school district had failed to provide free appropriate public education by reason of not providing a residential placement, which flowed from the district's failure to properly conduct its child find activities. The school district had never informed the Does of their rights under IDEA. The district's failure to apprise the Does of their rights is even more egregious because, before his residential placement, Michael attended a private school where the district contracted for services with other children. Although Metro knew there were students there with disabilities not under contract, it never took any steps to have those children, including Michael, evaluated. The facial validity of the district's child find plan was not at issue in the administrative hearing nor at any subsequent level. The only issue is Metro's failure to comply with the requirements for child find which it had previously assured the state education agency it would follow.

On September 25, 1995, the administrative law judge ruled that the district's child find activities were inadequate under the statute. Nonetheless she held that the

Does knowledge that some services were available immunized the district from any liability.

On July 1, 1996, the District Court granted Metro's motion for summary judgment, affirming the decision of the ALJ. It held that the Does' knowledge of the availability of some special education services disposed of their case. The district court never held that there were no disputed issues of material fact. As the record shows, there is substantial dispute over the magnitude of the district's failure, in Michael Doe's case, to follow the procedures required by IDEA for locating, identifying and evaluating children with disabilities.

On January 5, 1998, the Sixth Circuit Court of Appeals reversed. Writing for a unanimous panel, Judge Boggs noted the impropriety of summary judgment in the face of disputed issues of material fact. Moreover, the court underscored that school districts must comply with their duties under IDEA notwithstanding the parents knowledge that some services existed for children with disabilities. "Even though the Does had some general knowledge of the availability of services, the failure by Metro to apprise the Does of their specific procedural and substantive rights could make reimbursement a proper remedy." *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir. 1998). Additionally, the court held that the Does may be entitled to reimbursement for the costs accumulated while the district's evaluation of their son was pending. Even if the district lacked notice of Michael's placement, it may still be liable for costs incurred during its own delay.

REASONS FOR DENYING THE WRIT

This Court should deny review. A request for a due process hearing seeking reimbursement for the costs of a residential educational placement is not an attack upon a district's child find plan. There is no uncertainty in the IDEA grant program such that the Spending Clause's requirements of certainty or notice to districts are implicated. Nor has this issue been raised at any stage of these lengthy proceedings before now. The Petition further misstates and distorts the findings below. There was no collateral attack upon the Petitioner's child find plan. Rather, there was a claim by the Respondents, as a response to Petitioner's defense of lack of notification, that Petitioner did not properly meet its duty under 20 U.S.C. §§1412(2)(C) and 1414(a)(1)(A) to locate, identify, and evaluate Michael Doe. This procedural failure to comply with an affirmative duty by Metro is properly raised in a hearing on a complaint with regard to a matter "relating to the identification, evaluation, or educational placement of the child" and as such is properly within the jurisdiction of the administrative law judge under 20 U.S.C. §1415(b)(1)(E). Finally, there were disputed issues of material fact as to the extent of the Does knowledge of the availability of services and the extent of Metro's procedural failures. For the reasons stated below the Sixth Circuit's decision does not create a violation of the Spending Clause, does not inappropriately expand the jurisdiction of due process hearing officers and did correctly apply the summary judgment standard.

ARGUMENT

I.

THERE IS NO AMBIGUITY IN THE GRANT SUCH AS TO CREATE INCONSISTENCY WITH THE REQUIREMENTS OF THE SPENDING CLAUSE, AND THIS ISSUE IS NOT TIMELY RAISED

The first issue raised by Petitioners revolves around whether or not parents of a child with disabilities who seek reimbursement for the costs of residential placement may, by reason of their claim be deemed to have collaterally attacked the adequacy of a child find plan and whether or not such a collateral attack, if allowed, is inconsistent with the Spending Clause.

These issues are raised here for the first time. They were not raised below at either the state administrative hearing level, the District Court level or the Court of Appeals level. They are new issues. As such they may not be raised here for the first time. Such issues must be brought before the lower courts and appear on the record, otherwise they are not open for this Court's consideration. *Tyrell v. District of Columbia*, 243 U.S. 1, 6 (1916) citing *Furness, Withy & Co. v. Yang-Tze Insurance Association*, 242 U.S. 430, 431 (1916). The issues must have been raised and briefed in the lower courts. *California v. Taylor*, 353 U.S. 553, 557, n. 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958). Where an issue is not advanced in the courts below and was not argued to the Court of Appeals as a ground for reversing the trial court it should not be considered for the first time by this Court. *DeShaney v. Winnebago County Social Services Dept.*, 489 U.S. 189, 195, n. 2 (1989); *Youngberg v. Romeo*, 457 U.S.

307, 316, n. 19 (1982); and *Duignan v. United States*, 274 U.S. 195, 200 (1927). For this reason this Court should not hear these issues.

Even were the issues raised below, they are without merit. "States are required to identify, locate, and evaluate 'all children residing in the State who are disabled. . . . ' ". *Wise v. Ohio Department of Education*, 80 F.3d 177, 181 (6th Cir. 1996). The existence of an approved plan for funding does not mean the requirements of the law are met. If it did, no parent could ever challenge any aspect of the adequacy of their child's special education because all local education agencies (LEAs) have approved plans for funding that cover all aspects of the law. Further there is an "affirmative duty" to assure that all children who are disabled are identified, located and evaluated. *Robertson County School System v. King*, No. 95-5526, 6th. Cir. 1996.[2]

The implementing regulations of IDEA, at 34 C.F.R. §300.220, in a note, state that the LEA "is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction." Further, the Administrative Policies and Procedures Manual of the Tennessee Department of Education states at page 118 that the LEA is responsible for the identification, location and evaluation of eligible children or children suspected of being

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[2] This unreported case from the Sixth Circuit is cited here because the District Court decision it reversed was relied upon by the Administrative Law Judge and the District Court Judge below in this case.

eligible for special education whose parents reside within the school system but who are enrolled in schools located outside the system. For a program of education to be considered appropriate it must "meet the State's educational standards" and comply with the "procedures set forth in the act." *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 203 and 206 (1982). Here neither was done. Congress did not pass a simple funding statute, but conferred on students with disabilities an enforceable substantive right. *Honig v. Doe*, 484 U.S. 305, 310 (1988).

It is abundantly clear then that there was no uncertainty whatsoever about the terms of the IDEA grant to Petitioner Metro. Metro merely failed to identify and evaluate a child whose location, along with others, it already knew about, as it admitted.[3] The court of appeals recognized the obvious: the district's statutory duty is not satisfied by paper promises. What the ALJ and the Sixth Circuit found inadequate was the district's execution of its "child find" duties with regard to Michael Doe.

II.

THE ADMINISTRATIVE LAW JUDGE ACTED WITHIN HER JURISDICTION

The Administrative Law Judge made no finding about the contents of the child find portion of Metro's approved plan. To say otherwise distorts and misstates the record.

What the ALJ did was to find that Metro's child find activities "as related to locating students suspected of

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[3] Joint Appendix Vol. VI, p. 2151, being page 170 of the transcript of the administrative hearing of June 5, 1995.

being eligible for services in a private school which is specifically geared for learning disabled students is found to be inadequate . . . "[4]

The ALJ was presented with a request for reimbursement of the costs of a residential educational placement. As a part of the response to that request the Petitioner Metro raised a defense asserting that Michael was not enrolled in Metro and the parents had not asked Metro to pay for the residential placement prior to enrolling him in the residential placement. In response to this asserted defense the parents asserted that Metro had failed in its procedural duty of locating, identifying and evaluating their child. This duty is commonly referred to as "child find" but is a broader duty than just child find because it includes the duty to evaluate and prepare a program for a child once found.

A parent may request an impartial due process hearing "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(1)(E).[5] As the Ninth Circuit has noted, hearings may be requested " 'respect[ing] any matter relating to the identification . . . of the child.' " *Hacienda La Puente Unified School District v. Honig,*

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[4] Final Order, Tennessee Department of Education, Case No. 94-71, pp. 9 and 12, Joint Appendix, Vol. II, pp. 1148-1149 and 1152.

[5] Pursuant to 20 U.S.C. §1415(b)(2) the State educational agency may have a one or two tiered hearing process. Tennessee has chosen to have a single hearing conducted by a state administrative law judge appointed by the Tennessee Department of Education.

976 F.2d 487, 492 (9th Cir. 1992), citing 20 U.S.C. §1415(b)(1)(E) and the implementing regulation 34 C.F.R. §300.506(a). Likewise, under Tennessee law a child's parent may have a hearing regarding "an action or omission by state or local authorities on the ground that the child has been or is about to be: (1) Denied entry or continuance in a program of special education appropriate to the child's condition and needs;" T.C.A. §49-10-601(a) and (a)(1). Likewise the Tennessee Department of Education's Administrative Policies and Procedures Manual provides that a hearing may be requested on the grounds that a child has been or is about to be "denied identification, evaluation, entry or continuance in a program of special education appropriate to his condition and needs." *Policies and Procedures Manual* at p. 103.

Clearly, the ALJ may hear proof and make findings relative to whether or not the school system has failed to provide free appropriate public education by reason of its failure to identify, locate and evaluate an eligible child. As this Court has noted, the administrative complaint and resulting civil action may concern, " 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.' " *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley*, 458 U.S. 176, 204-205 (1982).

The Administrative Law Judge acted within her jurisdiction.

III.

THERE ARE DISPUTED ISSUES OF MATERIAL FACT AS TO WHETHER OR NOT METRO MET ITS DUTY TO IDENTIFY, LOCATE AND EVALUATE MICHAEL DOE

Metro does not contest that there is a dispute about whether or not their failure to conduct sufficient child find activities resulted in a procedural violation serious enough to justify reimbursement for the residential placement. As a preliminary matter the Court of Appeals held that the due weight standard "does not mean that the district court can simply adopt the state administrative findings without an independent re-examination of the evidence." *Doe v. Metropolitan Nashville Public Schools*, et al., 133 F.3d 384, 387 (6th Cir. 1998). It then went on to note that there was a dispute about the degree of the Respondents' knowledge and the degree of the Petitioner Metro's procedural failures. *Ibid* at 388.[6] As the Court of Appeals noted the District Court must re-examine the evidence, per *Rowley*, to determine if any material facts are in dispute. If they are then the district court may not then weigh the evidence at the summary judgment stage. *Doe*, supra, 133 F.3d 384, 387, citing *Anderson v. Liberty Lobby*, 477 U.S. 232, 249 (1986). The Court of Appeals

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[6] Metro has not appealed that portion of the Sixth Circuit's decision holding that the District Court should have reviewed the ALJ's determination that reimbursement was not appropriate for that period of time after the pendency of their request for services, since Metro was then on notice and their failure to ask defense would not apply. 133 F.3d at 388.

correctly found that there were material facts in dispute under the *Anderson v. Liberty Lobby* standard.

CONCLUSION

For the reasons set forth above the Petition should be denied.

Respectfully submitted,

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